INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 955

EASTMAN KODAK COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1337–1340)[1] is not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered December 11, 1946 (R. 1340–1341). The petition for writ of certiorari was filed January 27, 1947. The jurisdiction of this Court is invoked under Section 5 (c) of the Federal Trade Commission Act, as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45 (c), and Section 240 (a) of the

[1] Record references herein are to pages, not folios. The references in the petition are to folios.

Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the provision of the Miller-Tydings amendment to Section 1 of the Sherman Act legalizing resale price maintenance contracts for commodities "in free and open competition with commodities of the same general class produced or distributed by others" should, in view of a legislative history showing a purpose to insure effective price competition from similar commodities, be construed to legalize price maintenance contracts for:

1. Kodachrome Film which is manufactured and distributed solely by petitioner and is the only available film for taking natural color pictures and has a consumer appeal distinct from, and uses which cannot be filled by, black-and-white film.

2. Magazine Film which is manufactured and distributed solely by petitioner and is the only kind of film that owners and purchasers of certain types of cameras can use.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or

practices in commerce, are hereby declared unlawful.

Section 1 of the Sherman Act, c. 647, 26 Stat. 209, 15 U. S. C. 1, as amended by the Miller-Tydings Act, c. 690, 50 Stat. 693, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and

for other purposes', approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. * * *

STATEMENT

In a proceeding under section 5 of the Federal Trade Commission Act, the Commission made the following, among other, findings of fact:[2]

Petitioner is the largest manufacturer and distributor of photographic material, apparatus and equipment in the United States, doing a net annual business in excess of $100,000,000 (R. 53). One of the principal products of petitioner is amateur photographic film for the taking of still and motion pictures in color, which is sold under the trade name "Kodachrome" (R. 70). Another amateur photographic film manufactured and sold by petitioner in substantial quantities is the Magazine Cine-Kodak Film, or so-called "Magazine Film" for taking motion pictures (R. 53). Petitioner sells and distributes its Koda-

[2] Except with respect to the Commission's inferences and the fact discussed in note 4, *infra*, p. 9, the facts herein set forth are not disputed in the petition.

chrome and Magazine Film directly to about 16,000 retail dealers and to a large number of wholesale dealers who in turn resell to about 50,000 retail outlets located throughout the United States (R. 54).

Since 1938, in connection with its sale of Kodachrome and Magazine Film in interstate commerce, petitioner has used a resale price maintenance policy and system for the purpose of fixing and controlling the prices at which retail dealers resell Kodachrome and Magazine Film to the public and of causing such products to sell at prices uniform among said dealers. In order to carry out the resale price maintenance policy and system, petitioner has entered into agreements with retail dealer customers in those states where fair trade acts have been enacted (in some 44 states) and are valid and existing laws, under the terms of which agreements the retail dealer customers agreed to maintain uniform minimum retail resale prices for petitioner's Kodachrome and Magazine Film. Petitioner has made known to the trade the fact that it has established such minimum retail resale prices and that it expects and requires dealers in those states not to sell those products at retail below the established minimum prices (R. 54–55). Since petitioner's Kodachrome and Magazine Film and the containers in which they are sold contain the trademark and name of petitioner and since its resale price maintenance contracts covering those prod-

ucts are used only in states where such contracts are lawful, the only issue raised in the pleadings and trial of this case is whether petitioner's Kodachrome and Magazine Film are in free and open competition with commodities of the same general class produced or distributed by others so as to bring the contracts within the Miller-Tydings amendment to the Sherman Act. (R. 55–56).

Petitioner's Kodachrome film is a natural color film which is capable of reproducing by itself the natural colors of the subject photographed. The process by which Kodachrome is sensitized to color and the process by which such film is developed and by which prints are made are apparently in part secret and in part protected by patents, and the films, after exposure, must be sent to the petitioner for processing (R. 71). Kodachrome, by reason of its ability to reproduce photographic images in natural color, has a very great appeal to the consuming public and is extensively used by the amateur photographer. In addition, Kodachrome is extensively used in medicine to disclose pathological conditions and in the presentation of surgical conditions and in agriculture for the purpose of showing actual growing conditions and the nature and character of plant diseases, their causes and corrections, particularly in soil deficiency. These conditions would not show in a black and white photograph. It has also been used in museums of natural history and in art

museums in making pictures in color of objects in which color is indicated as an art feature (R. 57–58).

Petitioner is the only manufacturer and distributor in the United States of natural color film for use in the taking of motion pictures. For all practical purposes, petitioner is also the only manufacturer and distributor in the United States of natural color film for use in taking still pictures.[3] The prices charged by petitioner for Kodachrome are substantially higher than the prices charged by petitioner and other manufacturers for black and white film (R. 57). The principal manufacturers of black and white film other than petitioner are Agfa Ansco Corp., DuPont Film Manufacturing Corp., and The Gevaert Company of America, Inc.

Kodachrome is not in the same general class as and is not in free and open competition with black-and-white film, and a purchaser wishing to take photographs or moving pictures in natural color is required to purchase film for this purpose solely from the petitioner (R. 72).

Magazine Film consists of the enclosure of either black-and-white or Kodachrome motion picture film in a special magazine or container

[3] At the hearings, testimony was offered in respect to other so-called "color products". The Commission found that none of these other color products is in the same general class or sold in competition with petitioner's Kodachrome (R. 58–60). Petitioner does not challenge these findings.

732474—47——2

designed to fit a Magazine Cine-Kodak Camera (R. 53). It is designed to facilitate loading and unloading of the camera and permits the removal of one Magazine Film before it is entirely exposed and replacement with another. This permits the operator to change at will to either black-and-white or Kodachrome because of the nature of the subject being photographed or lighting involved or to obtain continuity of pictures on a particular film (R. 54). The magazine and the enclosure of such film in such magazine are covered by patents issued to the petitioner. Petitioner also holds patents upon its Magazine Cine-Kodak Camera in which this Magazine Film, both black-and-white and Kodachrome, is used. Petitioner also has patents on some of the combination features involved in the use of this magazine with the Magazine Cine-Kodak Camera. Bell & Howell is licensed by petitioner to manufacture and sell an amateur motion picture camera which will take petitioner's Magazine Film. There is another camera known as the "Perfex" which uses petitioner's Magazine Film (R. 53). By reason of the patents held by the petitioner on its Magazine Film, purchasers and owners of petitioner's Magazine Cine-Kodak Cameras, Bell & Howell Magazine Cameras, and Perfex Magazine Cameras are limited to the exclusive use of petitioner's Magazine Film in operating such cameras as no other film will fit

in such cameras (R. 54).[4] Magazine Film, both black-and-white and Kodachrome, is not sold in free and open competition with commodities of the same general class.

The direct effect and result of petitioner's resale price maintenance policy and system is to suppress competition in the distribution and sale of petitioner's Kodachrome and Magazine Film, to constrain dealers to sell those products at the prices fixed by petitioner and to prevent them from selling the products at such less price as they may desire, and to deprive the ultimate purchasers of those products of such advantages in price as they would otherwise obtain from a

[4] Petitioner asserts (Pet., pp. 21–22, 30) that the Magazine it sells is "interchangeable" with that made and sold by other manufacturers. The only pertinent evidence which petitioner cites (R. 112, Fol. 559) is not clear as to whether the "interchangeable" film includes motion picture Magazine Film such as is involved in this case. Exhibit 9, the resale price fixing contract (original, not printed), shows that resale prices are established only for 16 mm. and 8 mm. moving picture film in Magazines, not for the 35 mm. film referred to at R. 112. The parties stipulated that petitioner has "patent protection * * * upon the Magazine in which Magazine Cine-Kodak film" is sold, upon the camera using the Magazine, and upon some features of the combination. Commission Exhibit 8D (original, not printed). This stipulation supports the Commission's finding (R. 54) that by reason of the patents purchasers of the specified types of camera are limited to the exclusive use of petitioner's Magazine Film. Even if the evidence were regarded as conflicting, there would be sufficient to support the Commission's finding. See also R. 101, 227, 271, 309, 569, 586, 899–900, 963, 1092, 1118, 1133, 1152, 1166.

natural and unobstructed flow of commerce in those products under conditions of free and open competition.

The Commission concluded that the acts and practices of petitioner are to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act (R. 62). It thereupon entered an order directing petitioner to cease and desist from entering into, enforcing or continuing in operation any agreement or understanding with its dealer customers fixing the prices at which petitioner's Kodachrome and Magazine Film is to be offered for sale or sold by such dealer customers. The order further provides that if conditions later change so that there are other commodities of the same general class produced or distributed by others which are sold in free and open competition with petitioner's Kodachrome or Magazine Film the Commission will upon proper showing by the petitioner reconsider the terms of the order in the light of such new conditions (R. 63–64).

On petition to review (R. 2–12) the court below, on November 27, 1946, rendered a unanimous opinion affirming the Commission's order in its entirety (R. 1337–1340).

ARGUMENT

1. The ultimate questions in this case are whether petitioner's Kodachrome, the only na-

tural color film, and petitioner's magazine film, which is the only film usable in certain cameras, are "in free and open competition with commodities of the same general class produced or distributed by others" within the meaning of the Miller-Tydings Act. Those questions, which relate to the facts of this particular case, were clearly correctly decided below.

Prior to its amendment by the Miller-Tydings Act, Section 1 of the Sherman Act rendered resale price maintenance contracts unlawful. *Dr. Miles Medical Co.* v. *John D. Park and Sons Co.*, 220 U. S. 373; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441. The Miller-Tydings Act amended that section to legalize such contracts under certain specified conditions, one of which is that the commodity must be "in free and open competition with commodities of the same general class produced or distributed by others." The purpose of this condition is clearly shown by its legislative history to be to preserve for consumers the protection of price competition. Senator Tydings, an author of the amendment, stated in the Senate (81 Cong. Rec., p. 7495):

> This is not an effort to tear down the antitrust law. It is an effort to strengthen the antitrust law, to make it apply so that the small businessman shall enjoy the same privileges which larger businessmen have enjoyed under the Sherman antitrust law through all the years. The bill is against

monopoly. It is in behalf of the small and independent business. * * *

What does the amendment do? It permits a man who manufactures an article to state the minimum resale price of the article in a contract with the man who buys it for ultimate resale to the public, provided—and this "provided" is mountain high—that the article about which the contract is written is in free and open competition with other articles. If it is not in free and open competition with other articles, no such contract may be written.

* * * The very language of the amendment says that such contracts shall be legal only as to articles which are in open and direct competition with other articles. The element of competition is never absent in a single line of this measure. This is a measure for the small businessman; * * *

Likewise, Congressman McLaughlin, a member of the Subcommittee of the House Committee on the Judiciary, reported to the House (*ibid.*, p. 8141):

It [the Miller-Tydings bill] merely allows the seller and buyer of trade-marked or identified goods, sold in free open competition with similar goods, to contract for resale of goods according to the State law, if they want to do so. * * *

It is to be particularly noted that the act makes valid, as to goods flowing in interstate commerce, only those contracts in which the goods included therein are sold

> in open competition with other goods of similar character. Thus the act is in no sense a measure which will sanction contracts granting monopolies or combinations in restraint of trade. The provisions of the Sherman Act specifically prohibiting such contracts are not changed by this act but continue to remain in force. The act does not legalize contracts to maintain prices between manufacturers or sellers of different trade-marked articles of the same class or character. It only authorizes or permits contracts between the seller and the buyer, regarding resale price, as to a particular article, and then only provided that article is in free and open competition with articles of a similar character produced or distributed by others, and further provided only that the contract is authorized under the laws of the state in which it is to be carried out.

A construction which places Kodachrome and black-and-white film in the same class would not accomplish the legislative purpose of preserving effective price competition. They are not similar but distinctive commodities, manufactured and processed differently and producing vastly different results. Their cost is substantially different, that of the colored film being much higher; the resale price maintenance notice (Commission Exhibit 16, not printed) shows that in 1939 the price of a roll of Kodachrome, eight exposures, was $1.35, whereas the price of non-colored still film of similar sizes ranged from 20¢ to 30¢.

Moreover, Kodachrome has a distinctive appeal and, to some extent, has uses which cannot be filled by black-and-white film. Kodachrome and black-and-white film are certainly more dissimilar than the commodities found to be non-competitive in *International Shoe Co.* v. *Federal Trade Commission,* 280 U. S. 291. There, the Court found that dress shoes, different in appearance and workmanship, and appealing to different tastes were not in competition with each other. It is of course immaterial, if true, that an increase in the price of Kodachrome would decrease the volume of its sales and increase the volume of sales of black-and-white film. In *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (C. C. A. 2), it was claimed that Alcoa did not possess the power to fix prices because of the existence of substitute metals. The Court nevertheless found the power to exist, stating that, "substitutes are available for almost all commodities, and to raise the price enough is to evoke them" (p. 426).

There would be free and open competition with Kodachrome only if another manufacturer produced an equivalent colored film. Even if this conclusion be debatable, it was not unreasonable for the Commission so to find, and that is sufficient for this case.

Petitioner argues that colored and non-colored film are in the "same general class", and refers to dictionary definitions of the word "class" and

to the interpretation given the words "similar", "like," etc. in statutes such as the Tariff Act (Pet., p. 22 *et seq.*). It is unnecessary, however, in this case to determine the precise breadth of this phrase, since even if the various types of film are in the same general class, they must also be in free and open competition with each other for the statutory exemption to apply. Here, whether or not in the same general class, the colored and black-and-white film were sufficiently different as not to be competitive in the sense required by the statute. Moreover, the phrase "same general class" like other portions of the Act (cf. *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 196–197) must be construed in the light of the purpose of the statutory provision as a whole.

Finally, it is also clear that a construction holding petitioner's Magazine Film to be in free and open competition with commodities of the same general class would nullify the legislative purpose. The owners and purchasers of petitioner's Magazine Cine-Kodak Cameras, the Bell & Howell Magazine Cameras, and the Perfex Magazine Cameras cannot purchase film for use in such cameras from any other source. See pp. 8–9, *supra*. They are therefore denied the protection of any semblance of price competition.

2. Although admitting that this Court has not construed the provision of the Miller-Tydings amendment involved in this case (Pet., p. 34),

petitioner contends that the decision below is in conflict with the decisions of this Court, federal district courts, and state courts. With respect to this Court, petitioner asserts only that the holding below is "in conflict with the language used" in this Court's decision in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corps.*, 299 U. S. 183 (Pet., p. 37). Even so limited the claim as to conflict is far fetched. In the excerpt from the *Old Dearborn* case quoted by petitioner (Pet., p. 34–35), the Court said that the phrase "fair and open competition" as used in the Illinois Fair Trade Act is "sufficiently definite" to satisfy constitutional requirements and that, "no one need be misled" as to its meaning or, "need suffer by reason of any supposed uncertainty" (pp. 196–197). But the Court was not required to and did not determine anything resembling the question now presented to reach the conclusion that the phrase was sufficiently definite to satisfy constitutional requirements.

Petitioner claims that in *Eastman Kodak Company* v. *E M F Electric Supply Co.*, 36 F. Supp. 111 (D. Mass.), *Eastman Kodak Co.* v. *Johnson Wholesale Perfume Co.* (D. Conn.), C. C. H. Trade Regulation Service, Supp. 1941–43, Par. 52,539; *Eastman Kodak Co.* v. *Fotoshop Inc.* (N. Y. Sup. Ct.) C. C. H. Trade Regulation Service, Supp. 8 Ed. Par. 25,163, and *Eastman Kodak Co.* v. *H. & B. Radio Corp.*, (N. Y. Sup. Ct.) C. C. H. Trade Regulation Service, Supp. 8 Ed.

Par. 25,308, the courts reached "the opposite conclusion on the identical facts and have held that the petitioner's Kodachrome film and film in magazine are in free and open competition with commodities of the same general class produced or distributed by others" (Pet., p. 7). Each of these cases arose under a state statute. In none of them does the opinion of the court so much as advert to the question here presented. Even if the point was raised by the parties, these *nisi prius* decisions, one in the Second Circuit itself, do not create any such conflict as to warrant review by this Court. Furthermore, in none of those cases was the Court reviewing a determination of the Federal Trade Commission, which is to be accepted as long as it has a rational basis even if a court might reach a different conclusion independently. *Unemployment Compensation Commission of Alaska* v. *Aragan,* No. 25, decided Dec. 1946, slip opinion, p. 9; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111. Petitioner further asserts that 32 courts in various states have granted injunctions restraining violations of fair trade contracts in respect to Kodachrome film and film in magazines (Pet. 8, 36–37). Since the cases are unidentified, they cannot be examined. It seems fair to assume, however, that they are no more significant than the four cited cases.

Petitioner cites as in conflict other decisions construing State Fair Trade Acts. Some of these do not raise or discuss the question presented by this case. *Gillette Safety Razor Co.* v. *Green,* 167 Misc. (N. Y.) 251; *James Heddon's Sons* v. *Callender,* 28 F. Supp. 643 (D. Minn.); *Miles Laboratories, Inc.* v. *Seigniours,* 30 F. Supp. 549 (D. S. C.). In the other cases there clearly was competition with comparable commodities serving the same function. *Schill* v. *Remington Putnam Co.,* 179 Md. 83, (a copyrighted book competing with other books); *Miles Laboratories, Inc.* v. *Owl Drug Company,* 67 S. D. 523, (Alka-Seltzer, in competition with Aspirin, Bromo-Seltzer, and other proprietary medicines); *Weco Products Co. v. Reed Drug Co.,* 225 Wis. 474, and *Weco Products Co.* v. *Mid-City Cut-Rate Drug Stores,* (Superior Court, Cal.), C. C. H. Trade Regulation Service, Supp. 8 Ed., Par. 25,525, (tooth brushes with patented nylon bristles competing with other tooth brushes); *Eli Lilly & Co.* v. *Saunders,* 216 N. C. 163 (various drugs [5]). Since none of these cases was concerned with the situ-

[5] The products fell into three groups: (1) products identical or substantially identical with products produced and distributed by others (216 N. C. 163, 166–167); (2) products manufactured under a patent license and sold in competition with identical products of other licensees, and in some instances "with unpatented products which are represented, advertised, and sold for the same conditions, indications, and purposes as the patented products are advertised, represented and sold" (p. 167); (3) products comparable to products pro-

ation in which the product of no other manufacturer served the same purposes, none conflicts with the decision below.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1947.

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duced and distributed by other manufacturers. The example of this group used by the court was "Amytal", described as "one of fifteen or twenty commercially available compounds derived from barbituric acid known to the trade as barbituric derivatives. They are sedatives and hypnotics and are sold by all the producers for the same therapeutic purposes" (p. 167).

U. S. GOVERNMENT PRINTING OFFICE: 1947